Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1336

UNITED STATES OF AMERICA,

Respondent,

v.

HAROLD HAMILTON,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DEBUS, BUSBY & GREEN, LTD.
By Robert J. Lyman
7th Floor, Luhrs Tower
45 West Jefferson Street
Phoenix, Arizona 85003
Attorneys for Petitioner

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, HAROLD HAMILTON, hereby petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, p. A-1) is a reported opinion. However, no citation is presently available. The District Court issued no written opinion.

JURISDICTION

The opinion of the Court of Appeals was issued on 6 February 1978. Rehearing was not requested. Judgment was

entered on 3 March 1978. The jurisdiction of the Supreme Court to review this case on Petition for Writ of Certiorari is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

1. Was Hamilton entitled to withdraw his guilty plea when the Trial Judge failed to literally comply with Rule 11 of the Federal Rules of Criminal Procedure by not personally advising Hamilton of the maximum possible penalty that could be imposed.

STATUTES AND RULES INVOLVED

Rule 11(c) of the Federal Rules of Criminal Procedure provides in pertinent part:

> "(c) Advice to defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands the following:
>
> (1) the nature of the charge to which the plea is offered, provided by law, if any, and the maximum possible penalty provided by law; . . ."

STATEMENT OF THE CASE

This case concerns the propriety of a trial court's failure to literally comply with Rule 11(c)(1) by allowing the Assistant United States Attorney to address the defendant and inform him of the nature of the charge and the maximum possible penalty. Hamilton contends that the failure of the trial court to personally advise him as to the maximum range of penalties contributed to a situation wherein he was not advised that the sentences could be ordered to run consecutively. For this reason, Hamilton's plea was not intelligently made.

Hamilton was originally charged in a four count indictment involving violations of the Federal Narcotic Laws including conspiracy and possession with the intent to distribute heroin. He was arraigned on 3 November 1976 and entered a plea of not guilty as to all counts of the indictment. After months of negotiation with the Government, Hamilton decided to enter a plea of guilty to two counts of the indictment.

On 3 March 1977 Hamilton withdrew his plea of not guilty as to Counts One and Two of the indictment and entered a plea of guilty as to those counts. At the time of the entry of these guilty pleas, Hamilton was not personally advised by the court that there was a possibility of consecutive sentences on each count. Instead, the following discussion was had between the Assistant United States Attorney and the defendant:

Examination of Mr. Hawkins

Question:	Mr. Hamilton, is your true name Harold Hamilton?
Answer:	Yes, it is.
Question:	And are you represented by your attorney this morning Mr. Edward Bell?
Answer:	Mr. Bell.
Question:	Have you had an opportunity to discuss the indictment, the charges pending against you, with him?
Answer:	I have.
Question:	Do you understand that you have been charged in the indictment with four different counts involving conspiracy to import heroin, conspiracy to possess heroin in the United States with intent to distribute it, and with possession of heroin on two different counts?

Answer: I am sir.

Question: And are you aware of the fact that these charges carry with them penalties of 15 years each?

Answer: I am sir.

Question: And a possible fine of $25,000.00.

Answer: Yes sir.

The Court: Just a moment. You have also got a minimum three year special parole term.

Question by Mr. Hawkins: And a minimum three year special parole term as to each count.

Answer: I understand.

Question: You have previously entered not guilty pleas to all of these counts. It is now your desire to withdraw to Counts One and Two your not guilty pleas?

Answer: Right, and plead guilty.

Question: You have previously entered not guilty pleas to all of these counts. It is now your desire to withdraw as to Counts One and Two your not guilty plea?

Answer: Right, and plead guilty.

Question: And enter a plea of guilty as to both counts?

Answer: Yes.

Question: You are aware of the maximum penalty as to each of those two counts?

Answer: A fifteen year maximum.

Question: And up to a $25,000.00 find and a three year special parole term as to each.

Answer: Yes.

The Court: That a minimum three years.

Question: And with that understanding in mind, is it now your desire to plead guilty to those two counts.

Answer: Yes it is.

Question: And are you doing so at this point voluntarily?

Answer: There is no deal been made. There is no nothing.

I am doing it on my own free accord.

Thus, at the time of the entry of these guilty pleas, Hamilton was not personally advised by the court that there was a possibility of consecutive sentences on each count. Instead, the prosecutor was allowed to make an inadequate Rule 11 inquiry. On 28 March 1977 Hamilton was sentenced as to Count One to imprisonment for a total of twelve years, followed by a fifteen year special parole term and a fine in the amount of $25,000.00. As to Count Two, Hamilton was ordered to be incarcerated for a period of twelve years, followed by a special parole term of fifteen years and an additional fine of $25,000.00. It was ordered that the sentence as to each count run consecutively with the sentence on the other.

On 7 April 1977 Hamilton filed a Motion to Set Aside the Guilty Plea based on the premise that the plea was not intelligently made. Hamilton's Motion to Withdraw His Guilty Plea was denied. On 6 July 1977 the trial court reduced and modified Hamilton's sentence as follows: as to Count One, Hamilton was ordered to be incarcerated for a period of ten years followed by a three year special parole term and was ordered to pay a fine in the amount of $25,000.00; as to Count Two, Hamilton was ordered to be incarcerated for a period of ten years followed by a three year special parole term and an additional fine in the amount of $25,000.00. It was ordered that these sentences were to be served consecutively for a total of twenty years imprisonment, followed by a six year special parole term and a total

fine in the amount of $50,000.00.

Hamilton filed a timely Notice of Appeal as to the denial of his Motion to withdraw His Plea of Guilty and as to the sentence as modified on 6 July 1977. His conviction was affirmed by the United States Court of Appeals for the Ninth Circuit in an opinion filed on 6 February 1978. Hamilton is presently incarcerated as the Federal Correctional Institute at Leavenworth, Kansas, pending disposition of this appeal.

REASON FOR GRANTING THE WRIT

Hamilton contends that the writ should be granted for the reasons that the Court of Appeals: (1) has rendered a decision in conflict with the decision of another Court of Appeals on the same matter; and (2) has decided a federal question in a way in conflict with applicable decisions of this court. Hamilton contends that the trial court's failure to literally comply with Rule 11(c)(1) of the Federal Rules of Criminal Procedure requires that his guilty plea be vacated and that he be given the opportunity to plead anew.

The Court of Appeals has failed to follow the spirit of this Court's decision in *Kercheval v. United States*, 274 U.S. 220 (1927). In that case, this court recognized that a plea of guilty differs substantially in the purpose and effect from a mere admission or an extrajudicial confession, in that the plea is itself a conviction. Like the verdict of a jury, the plea is conclusive and no more is required of the court but to give judgment and sentence on the plea. Thus, this court stated that trial judges should be careful that a plea of guilty not be accepted unless made voluntarily after proper advice and with full understanding of the consequences.

The Court of Appeals has also failed to follow the direct mandate of this Court's decision in *McCarthy v. United States*, 394 U.S. 459 (1969). In that case, this court held that whenever a defendant proves that a trial judge accepted his guilty plea without fully adhering to the procedure provided for in Rule 11, he is entitled to the vacation of the judgment of guilt and to enter a plea of not guilty.

In the case at bar, there is no question that the trial court did not fully adhere to the spirit and mandate of Rule 11, when it failed to personally inform Hamilton of the maximum possible penalty, including that possible from consecutive sentences. The court also erred by allowing the prosecutor to participate in the Rule 11 inquiry.

Several cases decided in the United States Court of Appeals for the Ninth Circuit, decided before the 1975 Amendments to Rule 11 held that it was unnecessary for the court to inform the defendant of the possibility of consecutive sentences. However, Hamilton contends that these decisions are no longer valid based upon the new requirement that the court personally address the defendant and personally advise him of the maximum possible penalty. Hamilton's position is further supported by the American Bar Association standards relating to pleas of guilty. Standard 1.4 provides in pertinent part:

> "1.4 Defendant to be advised by court.
>
> The court should not accept a plea of guilty or nolo contendere from a defendant without first addressing the defendant personally and . . . (c) informing him: (i) of the maximum possible sentence on the charge, including that possible from consecutive sentences; . . ."

Further, in dealing with the withdrawal of a guilty plea,

the American Bar Association standard 2.1 provides in pertinent part:

> "2.1 Plea withdrawal. (a) the court should allow the defendant to withdraw his plea of guilty or nolo contendere whenever the defendant, upon a timely motion for withdrawal, proves that withdrawal is necessary to correct a manifest injustice . . . (ii) withdrawal is necessary to correct a manifest injustice whenever the defendant proves that: . . . (3) the plea was involuntary, or was entered without knowledge of the charge or that the sentence actually could be imposed."

In addition, Hamilton contends that the trial court's reliance upon the Assistant United States Attorney, in violation of Rule 11, resulted in the entry of a plea that was not intelligently made. Hamilton's argument was rejected by the United States Court of Appeals for the Ninth Circuit which held:

> "Requiring the court to inform a defendant of penalties does not necessarily mean that the words must literally issue from the Judge's lips. We conclude that a reasonable interpretation of Rule 11 is that it means a Judge must insure that the defendant understands the possible penalties before his plea is accepted.
>
> The court can, within certain limits, satisfy the requirement by directing that another advise the defendant in the court's presence. The crucial requirement is that the Judge be satisfied that the defendant understands the possible sentences and that such understanding be apparent to the record." App. A, p. A-6, ___ F.2d ___ (1978).

This decision is in direct conflict with several decisions of the United States Court of Appeals for the Fifth Circuit; *United States v. Crook*, 526 F.2d 708 (1976); *United States v. Narisi*, 538 F.2d 1213 (1976); and *United States v. Aldridge*, 553 F.2d 922 (1977).

In *Crook, supra,* the defendant pleaded guilty to a firearms violation and subsequently moved the District Court to withdraw the plea and to enter a nolo contendere. Following the court's refusal to accept a nolo plea, the defendant indicated his willingness to enter a plea of guilty. At that time, the United States Attorney read the indictment to the defendant and informed him of the range of penalties for the offenses charged. It was the prosecutor, rather than the Judge, who inquired whether defendant understood the nature and consequences of his plea and whether the plea was made voluntarily. On these facts, the Fifth Circuit reversed the conviction stating:

> "In summary, we read the language of Rule 11 requiring the court to personally address the defendant to mean exactly what it says. McCarthy and Vera requires such an interpretation. One of the primary objectives of Rule 11 was to prevent the entry of a guilty plea by a defendant who did not fully understand the nature and consequences of his plea; the methods chosen by Congress to achieve this objective was to require the trial Judge to question the defendant rigorously on the voluntariness of his plea. Allowing the prosecutor to make the required inquiries of the defendant results in the creation of an atmosphere of subtle coercion that clearly contravenes the policy behind Rule 11." 526 F.2d at 710.

In *United States v. Aldridge*, the defendant pleaded guilty to a firearms violation. After being sentenced to two years confinement, he appealed from the conviction alleging that the District Court failed to follow Rule 11 of the Federal Rules of Criminal Procedure in accepting his plea. The Fifth Circuit found three errors in the acceptance of the guilty plea, including the reliance of the Judge upon the prosecutor to make the necessary Rule 11 inquiry. The conviction was reversed and remanded for the entry of a new plea, the court stating:

"Our review of the record indicates that the District Court failed to follow Rule 11 in three respects. First, the court failed to ascertain, through personal inquiry, whether the defendant, Aldridge, understood the nature of the charges against him. The only questioning on this point came from the prosecutor, and Rule 11 places this responsibility squarely upon the shoulders of the district Judge. See *McCarthy v. United States*, 394 U.S. 459, 456-466, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969); *United States v. Narisi*, 538 F. 2d 1213 (5th Cir. 1976).

This court's decisions has emphasized that the District Court's questioning must be careful, and that the compliance with Rule 11 must be literal. See *Sierra v. Government of Canal Zone*, 546 F. 2d 77, 79 (5th Cir. 1977); *United States v. Crook*, 526 F. 2d 708, 710 (5th Cir. 1976)." 553 F.2d at 922.

This court decided in *McCarthy v. United States, supra,* that whenever a trial judge does not fully adhere to the procedures mandated in Rule 11, a defendant is entitled to a withdrawal of a guilty plea and the opportunity to plea anew. The United States Court of Appeals for the Fifth Circuit has ruled on several occasions that compliance with Rule 11 must be literal and that the trial court cannot rely upon the prosecutor to make the requisite Rule 11 inquiry. The opinion of the United States Court of Appeals for the Ninth Circuit affirming Hamilton's conviction conflicts with these decisions and fails to follow the direct mandate of this court. Hamilton contends that the appellate court's failure to follow the decisions of this court and the direct conflict between the United States Court of Appeals for the Fifth and Ninth Circuits should be resolved and that this court should exercise its powers and grant the writ.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,
DEBUS, BUSBY & GREEN, LTD.

By Robert J. Lyman
Attorneys for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee,	)	
v.	)	No. 77-2900
HAROLD HAMILTON, Appellant.	)	OPINION

(FILED: February 6, 1978)

Appeal from the United States District Court
for the District of Arizona

Before: WRIGHT and HUG, Circuit Judges, and INGRAM, District Judge.*

PER CURIAM:

Appellant asks this court to vacate convictions for two drug-offenses to which he pleaded guilty in the district court.

FACTS:

On March 3, 1977, Hamilton withdrew a general plea of not guilty and substituted guilty pleas on two counts of a four-count indictment. Pursuant to a plea agreement, the prosecutor successfully moved to dismiss the remaining counts. Hamilton moved to withdraw his plea after consecutive sentences were imposed. He appeals from the denial of that motion.

*Of the Northern District of California.

At the hearing on the change of plea, the trial judge relied on the prosecutor to advise appellant of the potential penalties on each of the two counts.[1/] The judge asked Hamilton specifically whether he understood the penalties as explained by the prosecutor. Hamilton responded that he did. Neither the prosecutor nor the judge expressly informed Hamilton that the sentences could run consecutively.

Hamilton contends that his conviction must be vacated because the trial judge himself did not explain the potential penalties and because he was not told of the possibility of consecutive sentencing.

This appeal squarely presents the question of what procedures must be followed by a trial judge to satisfy the requirements of Fed. R. Crim. P. 11 governing acceptance of guilty pleas.

DISCUSSION:

Fed. R. Crim. P. 11 reads:

> Rule 11. PLEAS
>
> (c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following;
>
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; . . . .

Prior to its amendment in 1975, Rule 11 required only that a judge determine that a defendant's plea was made with an understanding of its "consequences." See Notes of the Advisory Committee on 1966 Amendments to Rule 11, *reprinted in* 8 Moore's Federal Practice ¶ 11.01[3] at 11-6 (1977).

If Rule 11's requirements are not met, the defendant must be given the opportunity to plead anew. McCarthy v. United States, 394 U.S. 459, 471-472 (1969).

1. Consecutive Sentences.

Hamilton argues that Rule 11 requires a judge to advise a defendant of the possibility of consecutive sentences before a guilty plea is entered. The 1975 version of the rule "summarizes roughly the holdings of the post-McCarthy decisions" interpreting the word "consequences." J. Bond, Plea Bargaining and Guilty Pleas 84 (1977).

Those decisions held that any factor which necessarily affected the maximum term of imprisonment was a Rule 11 "consequence." E.g., United States v. Myers, 451 F.2d 402, 404 (9th Cir. 1972). However, they did not require explanation of the possibility of consecutive sentencing, reasoning that the court's power to impose consecutive sentences is explained explicitly "in the separate explanation of the possible sentences on each count." Paradiso v. United States, 482 F.2d 409, 415 (3d Cir. 1973) (acknowledging that better practice would be to specifically advise); see also cases cited infra at n.4.

This reasoning is equally persuasive under the amended rule. Although at first glance the Notes of the Advisory Committee on 1975 Amendments to the Federal Rules of Criminal Procedure appear to suggest a contrary conclusion, they do not. They indicate that the objective of the 1975 amendments was to insure that a defendant knows the maximum sentence a judge may impose. Notes of the Advisory Committee on 1975 Amendments to Rules, Fed. R. Crim. P. 11, reprinted in 8 Moore's Federal Practice

¶ 11.01[4] at 11-7 to 11-18 (1977) (hereinafter 1975 Committee Notes).

The 1975 Committee Notes, however, interpreted the rule as promulgated by the Supreme Court, prior to its alteration in Congress. The rule as originally proposed required disclosure of the "maximum possible penalty provided by law for the offense to which the plea is offered." Id. at 11-9 (emphasis added).

The proposed rule thus reaffirmed the proposition that a defendant need be specifically advised of possible sentences only with respect to each offense. The 1975 Committee Notes suggest that because the penalty for an offense appears on the face of the statute defining the crime, a judge can ascertain exactly what to tell a defendant: "Giving this advice tells a defendant the shortest mandatory sentence and also the longest possible sentence for the offense to which he is pleading guilty." Id. (emphasis added).

In Congress the proposed rule generated controversy for its failure to enumerate important rights that are waived by offering a plea of guilty. Those were enumerated by Boykin v. Alabama, 395 U.S. 238 (1969).[2/] When the House Judiciary Committee reported the measure which became Rule 11, the rule had been modified to include a requirement that a defendant be advised of the rights waived by a plea and the phrase, "for the offense to which the plea is offered," was deleted from the section regarding advice about potential penalties. See H. R. Rep. No. 247, 94th Cong., 1st Sess 21 (1975), reprinted in [1975] U.S. Code, Cong. & Ad. News 674, 693.

It appears that clearer explanation of the rights discussed in Boykin v. Alabama, supra, was the purpose of

the committee's revisions. We think that the accompanying deletion was merely a technical amendment to the rule's text rather than an intentional enlargement of the judge's duty to inform.[3/]

Although one could argue that Congress, in deleting the phrase, intended to require disclosure of the possibility of consecutive sentences, in the absence of an indication of such intent, we think amended Rule 11 was meant merely to simplify a judge's task by emphasizing that the crucial consequences of entering a plea which must be explained to a defendant are the sentencing consequences, rather than other, less direct, implications of entering a guilty plea. See 1975 Committee Notes, supra at 11-10 (by implication). See generally J. Bond, Plea Bargaining and Guilty Pleas 148 (1975) (noting pre-amendment confusion in classifying consequences as direct or indirect). Cf. Sanchez v. United States, No. 77-2247, slip op. p. 3347 (9th Cir. Dec. 30, 1977) (parole revocation is a collateral consequence).

Hamilton was advised by the prosecutor of a possible 15-year sentence, a $25,000 fine, and a three-year special parole term (by the judge's interjection) as to each of the two counts. The court reasonably concluded that this explanation implicitly alerted Hamilton to the possibility of consecutive sentencing.[4/] We agree.

2. Reliance on the Prosecutor.

Relying on McCarthy v. United States, supra at 471-72, Hamilton contends that the trial judge's reliance on the prosecutor to inform him of possible penalties renders his plea invalid and affords him the opportunity to plead anew.

The judge asked Hamilton whether he understood the

penalties as explained by the prosecutor. That procedure satisfied the pre-1975 rule's command that the judge determine that a defendant understands the consequences of his plea. United States v. Yzabeck, 524 F.2d 641, 642-43 (1st Cir. 1975) (per curiam) (dictum). Accord United States v. Coronado, 554 F.2d 166, 173-74 & nn. 11 & 12 (5th Cir. 1977) (direct appeal from conviction on a plea entered under the former version of Rule 11). The question remains whether it met the post-amendment requirement that the "court address the defendant personally" and "inform him of, and determine that he understands" the penalties that may be imposed. See id. at 174 n.12.

Requiring the court to inform a defendant of penalties does not necessarily mean that the words must literally issue from the judge's lips. We conclude that a reasonable interpretation of Rule 11 is that it means a judge must insure that the defendant understands the possible penalties before his plea is accepted.

The court can, within certain limits, satisfy the requirement by directing that another advise the defendant in the court's presence. The crucial requirement is that the judge be satisfied that the defendant understands the possible sentences and that such understanding be apparent in the record.

Our conclusion conforms to McCarthy v. United States, supra, which instructed federal judges to spread a defendant's state of mind on the record at the time of the plea in order to avoid resort to after-the-fact speculation. 394 U.S. at 467. Furthermore, permitting partial delegation in a case such as this is supported by repeated admonitions that Rule 11 not become the vehicle to transform plea hearings into ritualistic

performances. See McCarthy, supra at 467 n.20; United States v. Guthrie, 517 F.2d 416, 418 (9th Cir. 1975); United States v. Youpee, 419 F.2d 1340, 1344 (9th Cir. 1969). Finally, it is supported by some evidence that the draftsmen attached no new special significance to the word "inform" as used in the 1975 version of the rule.[5/]

United States v. Crook, 526 F.2d 708 (5th Cir. 1976), upon which appellant relies, is inapposite. In Crook the judge completely delegated his responsibilities, allowing the prosecutor to conduct nearly all of the Rule 11 examination. Moreover, only the prosecutor questioned the defendant on the voluntariness of his plea. The reviewing court properly concluded that the potentially intimidating effect of prosecutorial questioning raised fatal doubts regarding the voluntariness of the plea.[6/] Id. at 710.

In this case the trial judge carefully advised the defendant of all Rule 11 matters except penalties.[7/] He satisfied himself that Hamilton understood the penalties as explained by the prosecutor. He failed to "inform" Hamilton of possible penalties only in a literal sense.

Moreover, Hamilton, unlike the appellant in Crook, does not challenge the voluntariness of his plea except insofar as he alleges it was uninformed. However, his understanding of the penalties is readily discerned from his recorded responses in the Rule 11 hearing transcript.[8/]

The procedure followed by the trial court was consistent with both the mandate of Rule 11 and the holding of McCarthy v. United States, supra. We caution district judges, however, that deviation from literal compliance with the rule should be undertaken only with the utmost caution to insure that the record reflects observance of the rules substantive import.

In this case the requisite caution was displayed. The convictions are affirmed.

FOOTNOTES

1/ The transcript of the Rule 11 hearing, with questions by the prosecutor, reads in relevant part:

Q: Are you aware of the fact that these [two] charges carry with them penalties of 15 years each?

A: I am, sir.

Q: And a possible fine of $25,000?

A: Yes, sir.

THE COURT: Just a moment. You have also got a minimum three-year special parole term.

Q: (the prosecutor): And a minimum special parole term as to each count?

A: I understand.

Q: You have previously entered not guilty pleas as to all of these counts. Is it now your desire to withdraw as to Counts I and II your not guilty plea?

A: Right, and plead guilty.

Q: And enter a plea of guilty as to both counts.

A: Yes.

Q: Are you aware of the maximum penalty as to each of those counts?

A: A 15-year maximum.

Q: And up to a $25,000 fine and a three-year special parole term as to each.

A: Yes.

THE COURT: That is a minimum three years.

2/ Boykin v. Alabama, supra, held that offering a guilty plea involves waiver of important constitutional rights, (e.g., jury trial, confrontation, right against self-incrimination) and that a knowing, voluntary waiver of those rights cannot be presumed from a silent record.

3/ During four days of hearings, only one reference was made to Rule 11(c)'s sentencing provision. See Amendments to Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 36 (1975) (Charles Sevilla) (referring to United States v. Myers, 451 F.2d 402 (9th Cir. 1972)). See also Proposed Amendments to Federal Rules of Criminal Procedure: Hearing Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93d Cong., 2d Sess. (1974).

4/ See, e.g., Villarreal v. United States, 508 F.2d 1132, 1133 (9th Cir. 1974); Johnson v. United States, 460 F.2d 1203 (9th Cir.), cert. denied, 409 U.S. 873 (1972); Hinds v. United States, 429 F.2d 1322, 1323 (9th Cir. 1970) (per curiam). See also United States v. Myers, 451 F.2d, 402, 405 (9th Cir. 1972).

5/ The draftsmen noted that the former rule required the court to "inform" a defendant of the consequences of his plea. 1975 Committee Notes, supra at 11-9.

6/ However, in addressing the delegation issue, the court relied on authorities which dealt not with who should ask the questions, but rather with who should answer them. See 526 F.2d at 709-10. We think reliance on those cases was mistaken.

7/ Even as to penalties, the judge carefully followed the prosecutor's explanation and interrupted to explain the special parole term.

8/ See n.1, supra.

APPENDIX B

Judgment

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee, No. 77-2900

vs. DC#CR76-344 WPC

HAROLD HAMILTON,

Appellant.

APPEAL from the United States District Court for the District of ARIZONA

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of ARIZONA (PHOENIX) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

Filed and entered FEBRUARY 6, 1978

Supreme Court, U. S.
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MAY 12 1978
MICHAEL RODAK, JR., CLERK

No. 77-1336

In the Supreme Court of the United States

OCTOBER TERM, 1977

HAROLD HAMILTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

SIDNEY M. GLAZER,
ANDREW S. GORDON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1336

HAROLD HAMILTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 568 F. 2d 1302.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1978. The petition for a writ of certiorari was filed on March 22, 1978, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner should have been allowed to withdraw his guilty plea after sentence because the trial judge had not expressly informed him during the Rule 11 proceeding of the possibility of consecutive sentencing.

STATEMENT

Petitioner pleaded guilty in the United States District Court for the District of Arizona to one count of conspiracy to import heroin (21 U.S.C. 963) and one count of conspiracy to possess heroin (21 U.S.C. 846). He was sentenced to 12 years' imprisonment, to be followed by 15 years' special parole, and a $25,000 fine on each count, the sentences to run consecutively. Thereafter he moved to set aside his guilty plea. The district court denied the motion, but it subsequently reduced the prison sentences to consecutive terms of ten years' imprisonment, followed by three years' special parole. The court of appeals affirmed (Pet. App. A).

On September 29, 1976, petitioner and his wife were accused in a four-count indictment of violations of the federal narcotics laws. On March 3, 1977, pursuant to a plea bargain whereby two of the counts against him would be dismissed, petitioner requested leave to plead guilty to the two remaining counts. At the outset of the proceeding required by Rule 11, Fed. R. Crim. P., petitioner was twice informed by government counsel that these charges carried "with them penalties of 15 years each," a possible fine of $25,000 and a minimum three-year special parole term as to each count. Petitioner responded that he was aware of these maximum penalties, that he desired to plead guilty, that his plea was voluntary, and that the only plea agreement concerned the dismissal of the other two counts (1 Tr. 3-4).[1] The district court then questioned petitioner and established that he was not under the influence of drugs, that he understood

[1] "1 Tr." refers to the transcript of the March 8, 1977, Rule 11 proceeding and the March 28, 1977, sentencing hearing. "2 Tr." refers to the transcript of the May 16, 1977, hearing on petitioner's motion to set aside his guilty plea.

the constitutional rights that he would waive by pleading guilty, that his guilty plea could result in a revocation of his probation, that he understood the possible penalties as outlined by the prosecutor, and that the government had made no promises in exchange for the plea other than those previously discussed (1 Tr. 5-8). The court outlined the nature of the charges, and petitioner explained his involvement in the heroin smuggling operation and confessed to his guilt (1 Tr. 8-9).

The district court concluded that petitioner's guilty plea was freely and voluntarily given and was supported by a factual basis. It therefore accepted the plea and referred the case to the probation office for a presentence report (1 Tr. 9-10). On March 28, 1977, after further questioning petitioner about the facts of the offense (1 Tr. 11-13), the court imposed consecutive sentences of 12 years' imprisonment, 15 years' special parole, and a fine of $25,000 on each of the two counts (1 Tr. 15-16).[2]

On April 6, 1977, petitioner moved to set aside his guilty plea, contending that it was based upon a representation that the maximum sentence he could receive was 12 years' imprisonment. Thereafter petitioner amended the motion, alleging in addition that he had not been advised that he could receive 15 years' imprisonment, a $25,000 fine, and a minimum three-year special parole term on each count and that he had been told that if he pleaded guilty his wife would receive probation. At the evidentiary hearing held on the motion, petitioner's attorney testified that he had advised petitioner that he risked additional punishment if he entered a guilty plea to two counts, but that the district judge rarely imposed

[2] Petitioner's wife then pleaded guilty to an accessory charge and was sentenced to five years' imprisonment (2 Tr. 58, 82).

consecutive sentences and that it was his guess that petitioner would be sentenced to 12 years' imprisonment (2 Tr. 34, 40-42, 48-49). The attorney denied that he had told petitioner that his wife would receive probation or that the government had offered to give her probation in exchange for petitioner's guilty plea (2 Tr. 29-30, 50). Petitioner testified that, based upon his previous experience with sentencing, he did not interpret the statement at the Rule 11 proceeding relating the maximum sentence on each count as indicating the possibility of consecutive sentencing (2 Tr. 66, 76-78, 84-85, 89). He maintained that his principal concern in pleading guilty was his wife and that his lawyer had stated that she would receive probation (2 Tr. 62, 64, 82, 88). Following the hearing, petitioner's motion was denied.

ARGUMENT

1. Petitioner contends (Pet. 7-8) that his guilty plea was invalid under Rule 11(c), Fed. R. Crim. P., because he had not been expressly informed of the possibility of consecutive sentences. But as the court of appeals concluded in an opinion upon which we basically rely, the Rule was satisfied when petitioner was told of the maximum possible penalty for *each* offense (1 Tr. 3-4).

The purpose of Rule 11 "is to assure defendants that they fully understand and can assess intelligently the risks attendant to pleading guilty prior to so doing." *United States* v. *Vermeulen*, 436 F. 2d 72, 75 (C.A. 2), certiorari denied, 402 U.S. 911. Before the 1975 amendments to the Federal Rules of Criminal Procedure, it was settled that this purpose was satisfied if the defendant was made aware of the maximum possible sentence on each count to which he offered to plead guilty, without any explicit admonition by the court that the sentences could be imposed consecutively. *United States* v. *Vermeulen*, *supra*, 436 F. 2d at 75; *Paradiso* v. *United States*, 482 F. 2d 409, 415 (C.A. 3); *Johnson* v. *United States*, 460 F. 2d

1203 (C.A. 9), certiorari denied, 409 U.S. 873; *Hinds* v. *United States*, 429 F. 2d 1322, 1328 (C.A. 9). Although Rule 11 was amended in 1975 to require that the defendant be informed of the "maximum possible penalty provided by law," it is significant that the Rule does not insist that he be informed of the maximum possible total sentence on all the charges to which the plea is offered, "including that possible from consecutive sentences," as does the American Bar Association, *Standards Relating to Pleas of Guilty*, § 1.4 (Approved Draft, 1968). Moreover, the history of the change, as the opinion below demonstrates, reaffirms that a defendant need only be specifically advised of the maximum possible sentence with respect to each offense (Pet. App. A-3 to A-5).

We recognize, as did the Third Circuit in *Paradiso* v. *United States*, *supra*, 482 F. 2d at 415, that it is preferable for district courts to state explicitly that the sentences can be consecutive, although such advice is not mandated by the Rule. Here, however, not only was petitioner informed at the Rule 11 proceeding that "each" of the two counts carried a maximum sentence of 15 years' imprisonment, but also he was represented by counsel who had discussed the possibility of consecutive sentences with him (although the attorney told petitioner that in his opinion the sentencing judge rarely "stacked" sentences) (2 Tr. 41-42).[3]

2. Relying on *McCarthy* v. *United States*, 394 U.S. 459, petitioner contends (Pet. 8-10) that the district court violated Rule 11(c) because it did not personally inform him of the maximum possible penalties but instead allowed the prosecutor to convey that information. This

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[3]It is also significant that petitioner does not claim that he would not have pleaded guilty if he had been expressly advised during the Rule 11 proceeding that the sentences could be imposed consecutively.

claim is incorrect. The record reflects that, although government counsel initially advised petitioner of the maximum penalties he could receive on each count, the court did participate by reminding counsel of the mandatory special parole term (1 Tr. 3). In addition, the court then proceeded to conduct an extensive inquiry into petitioner's understanding of his rights, which included questions regarding petitioner's awareness of the possible penalties as explained by the prosecutor (1 Tr. 7). This procedure fully complied with the Rule. As the court of appeals observed (Pet. App. A-6), "[r]equiring the court to inform a defendant of penalties does not necessarily mean that the words must literally issue from the judge's lips. * * * [A] reasonable interpretation of Rule 11 is that it means a judge must insure that the * * * defendant understands the possible sentences and that such understanding be apparent in the record." Accord, *United States* v. *Lambros*, 544 F. 2d 962, 965-966 (C.A. 8), certiorari denied, 430 U.S. 930.

Contrary to petitioner's assertion, the court of appeals' construction of Rule 11(c) does not conflict with *McCarthy* v. *United States, supra*. In that case the Court held that a defendant whose guilty plea had been accepted pursuant to a seriously defective Rule 11 proceeding must be permitted to withdraw his plea. The Court noted that "noncompliance deprives the defendant of the Rule's procedural safeguards that are designed to facilitate a more accurate * * * plea" (394 U.S. at 471-472), and it refused to assume from a silent record that the defendant had entered his plea " 'with a complete understanding of the charge against him' " (*id.* at 464).

McCarthy was therefore concerned with the necessity of requiring the defendant to respond personally and affirmatively to inquiries, so that a record would be created that would enable the trial judge "to ascertain the plea's voluntariness [and] * * * to support his determination in a subsequent post-conviction attack." *Id.* at 466.

See *Brady* v. *United States*, 397 U.S. 742, 748-749; *Boykin* v. *Alabama*, 395 U.S. 238, 243 and n. 5; *Halliday* v. *United States*, 394 U.S. 831, 832. However, the Court expressly declined to establish a litany for district courts to follow during a Rule 11 proceeding, recognizing that the nature of the inquiry must necessarily vary from case to case and that " '[m]atters of reality, and not mere ritual, should be controlling.' " *McCarthy* v. *United States, supra*, 394 U.S. at 467-468, n. 20, quoting from *Kennedy* v. *United States*, 397 F. 2d 16, 17 (C.A. 6).

Thus, "the error that was fatal in *McCarthy* was not that the court had not posed the relevant questions, but that the record did not show that they had been posed at all." *Davis* v. *United States*, 470 F. 2d 1128, 1131 (C.A. 3). Here, by contrast, the record of the guilty plea proceedings conclusively demonstrates that all the pertinent inquiries required by Rule 11 were made of petitioner. We submit that nothing in Rule 11 prohibits such questioning of a defendant by the prosecutor, either in whole or in part, in the presence of the defendant's counsel and the court. See *United States* v. *O'Donnell*, 539 F. 2d 1233 (C.A. 9), certiorari denied, 429 U.S. 960; *United States* v. *Yazbeck*, 524 F. 2d 641, 643 (C.A. 1); *Davis* v. *United States, supra*, 470 F. 2d at 1130-1132; *United States* v. *Benson*, 469 F. 2d 222 (C.A. 8). Although the Rule provides that "[b]efore accepting a plea of guilty * * *, the court must address the defendant personally in open court and inform him of, and determine that he understands," the nature of the charge and the consequences of his plea, the crucial factor is not that the court itself ask the questions of the defendant, but that "the record leave no doubt that the defendant heard and understood what was said." *United States* v. *Yazbeck, supra*, 524 F. 2d at 643 and n. 1.

This position is supported by the Advisory Committee Notes to the 1966 amendment of Rule 11, when the Rule was revised to contain the provision requiring the court to address "the defendant personally." In discussing this amendment the Advisory Committee remarked:

> The second change expressly requires the court to address the defendant personally in the course of determining that the plea is made voluntarily and with understanding of the nature of the charge. The reported cases reflect some confusion over this matter. Compare *United States* v. *Diggs,* 304 F. 2d 929 (6th Cir. 1962); *Domenica* v. *United States,* 292 F. 2d 483 (1st Cir. 1961); *Gundlach* v. *United States,* 262 F. 2d 72 (4th Cir. 1958), cert. den., 360 U.S. 904 (1959); and *Julian* v. *United States,* 236 F. 2d 155 (6th Cir. 1956), which contain the implication that personal interrogation of the defendant is the better practice even when he is represented by counsel, with *Meeks* v. *United States,* 298 F. 2d 204 (5th Cir. 1962); *Nunley* v. *United States,* 294 F. 2d 579 (10th Cir. 1961), cert. den., 368 U.S. 991 (1962); and *United States* v. *Von der Heide,* 169 F. Supp. 560 (D.D.C. 1959).

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The revision thus was designed to eliminate the practice of accepting guilty pleas in reliance upon assurances by the defendant's counsel or on other assumptions not appearing in the record, rather than to mandate that the defendant be questioned only by the court. *Phillips* v. *United States,* 519 F. 2d 483, 485 (C.A. 6); *Otero-Rivera* v. *United States,* 494 F. 2d 900, 903-904 (C.A. 1). See *Davis* v. *United States, supra,* 470 F. 2d at 1130-1131:

> The word "personally" in the amendment to the rule follows and therefore would appear to modify "defendant," not "court." The change was aimed at

> preventing a reliance by the court upon a statement or response of the defense attorney rather than the defendant himself to establish voluntariness and understanding of the charge and consequences of the plea. There is no indication that permitting counsel for either the Government or the defendant to address appropriate questions to the defendant was an evil at which the amendment was aimed, and we do not perceive evil in such procedures.* * *

Cf. 8 Moore's *Federal Practice,* para. 11.02[1], p. 11-23 (1977) ("The method by which a defendant may be advised of the charge may vary from case to case depending on the complexity of the action and the individual defendant").[4]

As petitioner notes (Pet. 8), the Fifth Circuit has reached a contrary result in a number of cases, a result that, for reasons we have already stated, we believe to be premised on an unnecessarily technical reading of Rule 11 that is supported neither by *McCarthy* v. *United States, supra,* nor by the history of the Rule. In any event, we do not believe that it is necessary for this Court to resolve the conflict at this time. Not only does the Fifth Circuit stand alone in insisting that the district court itself conduct the entire interrogation of a defendant prior to accepting his guilty plea, but also the issue, which has arisen only infrequently, does not appear to be sufficiently important to the administration of the criminal laws to require

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[4]Nothing in the 1975 amendments to Rule 11 suggests that a change in this settled interpretation was intended. To the contrary, the Advisory Committee Notes to the 1975 amendments state that "[s]ubdivision (c) *retains* the requirement that the court address the defendant personally" (emphasis added) (62 F.R.D. 278).

further review.[5] Moreover, the issue concerns an area of practice in which complete uniformity among the circuits does not appear to be essential.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

SIDNEY M. GLAZER,
ANDREW S. GORDON,
Attorneys.

MAY 1978.

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[5]Even assuming that Rule 11 imposes a non-delegable duty on the district court to interrogate the defendant prior to accepting a guilty plea, the Fifth Circuit has failed to consider whether the violation of this requirement may have been harmless. See Fed. R. Crim. P. 52(a); *United States* v. *Scharf*, 551 F. 2d 1124, 1130 (C.A. 8), certiorari denied, No. 76-1611, October 3, 1977.

[6]In other areas involving the acceptance of guilty pleas the Fifth Circuit similarly has imposed more rigorous requirements than other courts of appeals. For example, the court has required that the defendant be questioned under oath during the Rule 11 proceeding. See *Bryan* v. *United States*, 492 F. 2d 775, 781 (C.A. 5), certiorari denied, 419 U.S. 1079.

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